NO. 83-1142

In the Supreme Court of the United States

OCTOBER TERM, 1983

COSMAR COMPANIA NAVIERA, S.A.,
AND
THE UNITED KINGDOM MUTUAL STEAM SHIP ASSURANCE ASSOCIATION (BERMUDA) LIMITED

PETITIONERS,

VERSUS

SYMEON SYMEONIDES, Curator of
FRANGISKOS HAJIGEORGIOU

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, FIRST CIRCUIT, STATE OF LOUISIANA

REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT REQUIRED BY RULE 28.1

Petitioners, Cosmar Compania Naviera, S.A. and United Kingdom Mutual Steam Ship Assurance Company (Bermuda) Ltd. have no parent companies, subsidiaries or affiliates.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PREFACE

The Respondent's Opposition implies that Petitioner is creating false issues and is misrepresenting, or not fully disclosing relevant facts to the Court. The truth is: (1) The issues set forth by Petitioners are substantial issues properly preserved below; and, (2) Petitioner does not now nor ever did it attempt to hide, any factor relevant to determination of the choice of law/forum nonconveniens issues.

Petitioners' response corresponds to the structure of argument set forth in Respondent's Opposition.

REPLY TO RESPONDENT'S STATEMENT OF THE CASE

A. Introduction

Respondent's Opposition, page 3, suggests that the "central issue" is not the validity of Petitioners' asserted defenses but whether the trial court abused its discretion in striking these defenses as a discovery sanction.

Petitioners have not suggested that the merits of its choice of law/forum non conveniens defenses constitute the "central issues." At issue is whether the "beneficial ownership" information sought by Respondent is relevant to determination of these issues. As "beneficial ownership" is relevant the imposition of the discovery sanctions violated established precepts of the maritime law. The issue is not the merits of the forum non convenens/choice of law defenses, but the state trial court's refusal *to even consider their merit.* Relevant to, but independent from the forum non-conveniens/choice of law issues are the forum selection clause and the choice of law provisions of decedent's employment

contract. The trial court erred in not considering this issue.

B. The Facts

Four of Respondent's suggested "facts" are not established in the record: (1) That the vessel's base of operations was in New York through its U.S. agent, Celestial; (2) That the vessel had New York City as its home port and port of registry; (3) That the vessel was financed by a New York bank; (4) That the vessel made regular runs to and from the United States. Respondent's Opposition, 4-6. None of these "facts" was established by competent evidence.[1] The trial court refused to consider the issue of the vessel's "base of operations" home port, and all other matters relevant to choice of law/forum non conveniens.

Respondent has incorrectly suggested that the M/V ISABELLE was financed by a mortgage in favor of a United States bank. The answer to interrogatory upon which Respondent relies (Response to Interrogatory No. 151, R. 156) states:

> A mortgage in favor of an entity entitled the "Morgan Guaranty Bank of New York," but defendants have no certain knowledge as to whether that entity is physically of New York or Nassau.

Also relevant is the answer to Interrogatory No. 150:

> Financing was obtained on the Eurodollar market through the Morgan Guaranty Bank of New York in Nassau. The mortgage is presently held in Nassau, Bahamas, to the best of defendant's knowledge.

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[1] See footnote 3, *infra* at 5, with regard to the "facts" that the vessel's "home port" and "base of operations" were in New York.

It was not established as a "fact" that the vessel was on a regular schedule to and from the United States. Respondent's Opposition, 5, relying on the testimony of Panagiotis Karaflos, the Chief Mate. (R. 612-13). The pertinent testimony occurred during Petitioner's attempted examination of the witness to proffer the vessel's schedule on the record.[2] The trial judge sustained Respondent's objection. The "facts" of the vessel's itenerary were never established; the proffer was rejected.

Respondent suggests as "facts" on appeal which were not even considered by the state courts. The failure to consider the issues to which Respondent's "facts" relate is the thrust of Petitioner's argument.

Finally, Respondent elaborately outlines the course of discovery. Respondent's Opposition, 6-13. The course of discovery as its apparent from Respondent's own conclusion (Respondent's Opposition, 12), is irrelevant. The only relevant fact is that Petitioner refused to disclose the ultimate "beneficial ownership" interest in the trust that owned Cosmar. The ultimate "beneficial ownership" has no relevance to the choice of law/forum non conveniens issues. The imposition of *any* discovery sanction for refusal to provide this irrelevant information was improper.

REPLY TO RESPONDENT'S ARGUMENT

I.

Respondent's Argument A suggests that "beneficial ownership" was relevant to the issues of forum non conve-

[2] Under Louisiana Procedure, fact issues may be considered on appeal. La. Const. of 1974, Art. 5, Sections 5(C) and 10(B).

niens and choice of law and justified the striking of these defenses. Respondent argues that Petitioners do not support their argument that "beneficial ownership" is irrelevant and ignore *Lauritizen v. Larsen*, 345 U.S. 571 (1953) and *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306 (1970). Respondent's argument is without merit.

Clearly, *Lauritizen* and *Rhoditis* render the allegiance of the shipowner and the owner's "base of operations" important factors in the consideration of the choice of law/forum non conveniens issues. However, the shipowner's allegiance and "base of operations" refers to the immediate corporate vessel owner; there is no need, and it is improper to go beyond, the corporate vessel owner to determine ultimate "beneficial ownership." The Fifth Circuit, in *Volyrakis v. M/V ISABELLE*, 668 F.2d 863 (5th Cir. 1981) clearly suggests as much. See Petitioners' Original Submission, 13, 18. The case law cited in Petitioners' Original Submission, page 18, firmly establishes this proposition. Any sanction for refusing to provide this information is improper. A writ should be granted to fully consider the issue.

Respondent's Opposition, page 15, states that Petitioner did not object to the relevancy of interrogatories requesting the "beneficial ownership" information until it sought state court supervisory writs with regard to the appropriateness of sanctions. Respondent contends that counsel for Petitioners stated that they would answer the interrogatories.

The proper objections were made and the issue was preserved. Petitioner's counsel informed Respondent's counsel that he would provide all relevant information relating to the forum non conveniens/choice of law issues.

Counsel *did provide* the relevant information. The only information which was not disclosed was the irrelevant "beneficial ownership" information. The interrogatories were fully answered as required by maritime law. No objection was appropriate until the sanctions were imposed. Petitioner vehemently objected to the state court's actions by urging its objections throughout the trial and direct review proceeding, and by seeking before trial, discretionary supervisory writs before the state appellate courts. See Petitioners' Original Submission, 8-9. The issues were preserved for review.

Respondent asserts that further discovery was necessitated by the fact that the record was "replete" with confusing information.[3]

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[3] Respondent asserts that Petitioners' statement that the vessel's home port was (and still is) in Greece is contradicted by documents suggesting New York as her home port and by the fact that Celestial, a corporation with its office in New York, had a contract with Cosmar. Respondent's Opposition, 17-18. Respondent notes that the answers to interrogatories list Cosmar's principal office is in Syros, Greece, while the affidavit of Mr. Liverios Sterghiou, states that Cosmar's principal offices are in Panama. *Id.* Additionally, Respondent attacks Petitioners' Rule 28.1 certification concerning parents and subsidiaries by stating the trust which owns Cosmar should have been listed as Cosmar's parent company. *Id.*

Interestingly, the record is not contradictorily as Respondent would have the Court believe. The interrogatories clearly indicate that the home port of the vessel was Syros, Greece. This is supported by the Federal Maritime Water Pollution Certificate of Responsibility (P-9), the charter-party under which the vessel sailed at the time of the incident in question (R. 142, attachment to Supplemental Answers to Plaintiff's First Set of Interrogatories), and the affidavit of Mr. Sterghiou. The only indication to the contrary is in the undocumented preliminary information in a surveyor's report and notes.

With regard to the "confusion" concerning the principal place of business of Cosmar, there is no confusion at all. The answers to interrogatories did correctly state that the principal place of Cosmar's business is in Syros, Greece. While the English *translation* of Mr.

Initially, whether the information is "confusing" is to be considered in determining the merits of the choice of law/forum non conveniens issues. The "confusion" does not affect whether the "beneficial ownership" should be required to be disclosed. The vessel's home port, Cosmar's principal place of business, and its agency relationships are factors separate and apart from the question of "beneficial ownership". The information on the first three factors was provided; any "confusion" as to the first three factors is unrelated to the need for further discovery as to "beneficial ownership". Additionally, the maritime jurisprudence clearly establishes the irrelevance of the information pertaining to "beneficial ownership". Respondent could have and did propound interrogatories and other discovery and did ascertain the information relevant to forum non conveniens and choice of law. All relevant information was provided. The only matter presently at issue is the "beneficial ownership" information which under the maritime law, is irrelevant. Respondent has suggested the other "red-herring" issues to hide the true issue. The Court should not be misled by Respondent's attempt to cloud the issue.

Finally, Respondent's Opposition, pages 18 through

(Footnote 3 continued)
Sterghiou's affidavit does, initially, read that Cosmar's principal place of business is in Panama, this is clarified later in the affidavit, paragraph 3, wherein it is noted that Cosmar *operates* in conformity with the laws of Panama and that "its centre of activity is in the harbor of Piraeus (Greece), where it has its offices at the No. 5 Paleologou Street."

Respondent's last allegation concerning confusion, its attack on Petitioner's Rule 28.1 statement, is not "confusing" at all. Supreme Court Rule 28.1 requires a party to list "all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of each corporation. The ownership of Cosmar's stock is by a Micofo Ansalt Va Duz, a Lichstenstein *Trust*. There has been no confusing allegation or misrepresentation by Petitioner.

21, suggest that the district court properly refused to rule on the choice of law/forum non conveniens issues absent disclosure of the "beneficial ownership" information. Respondent avoids the authority establishing that "beneficial ownership" is irrelevant to the choice of law/forum non conveniens consideration. The answers to interrogatories, documents and affidavits provided more than adequate information to rule on the matter. Further information, as the Fifth Circuit recognized in *Volyrakis*, would have been irrelevant.

The Fifth Circuit, subsequent to the filing of Petitioner's Original Submission, explicitly reaffirmed its suggestion in *Volyrakis*. *Diaz v. Humboldt*, 722 F.2d 1216, (5th Cir. 1984):

> Diaz argues that he was not given complete discovery, that "the decision of the district court was premature and [that] this case should be remanded to allow for a full exposition of the facts on the record." We disagree. The documents and affidavits in the record demonstrate that Naviera Humbold (the shipowner) maintains no offices in the United States, is not owned or controlled by United States citizens, and manages the day to day operations of its vessels from outside the United States. As we stated in *Merren v. A/S BORGESTAD*, 519 F.2d 82 (5th Cir. 1975), 519 F.2d at 83:
>
> > In sum, all the facts necessary for the district court to come to the conclusion that the plaintiffs could not make out a Jones Act case were before the court.
> >
> > Any additional discovery would have no relevance to the decision and would thus be mere superfluity.

Diaz, 722 F.2d at 1219 (parenthetical added, brackets in original).[4]

Respondent has attempted to confuse the issues and to create confusion where there is none. The question of "beneficial ownership" is irrelevant in deciding the questions of choice of law and forum non conveniens. The state courts erred in imposing and upholding discovery sanctions. This issue, of importance to the General Maritime Law of the United States, its uniformity, and to world commerce, merits the issuance of a writ of certiorari.

II.

Respondent's Argument B contends that the federal decision in the companion case, *Volyrakis*, is not inconsistent with the present case because the *Volyrakis* did not involve the imposition of discovery sanctions for failure to provide information concerning "beneficial ownership". Respondent's Opposition, 21-23. Respondent argues the merits of the choice of law/forum non conveniens issues by comparing this case to *Fisher v. Agios Nicolas V*, 628 F.2d 308 (5th Cir. 1980), *cert. denied*, 454 U.S. 816 (1981). Respondent's Opposition, 23-25.

Respondent's argument places the cart before the horse. The state court decision is inconsistent with

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[4] The Fifth Circuit also noted in *Diaz* that the fact that a foreign shipowner does business in the United States is not sufficient to render American law, particularly the Jones Act, applicable. *Id.*, 722 F.2d at 1218. The mere fact that a vessel owner has an American agent also does not require the application of American law. *Id.* If the use of an American agent required the application of American law, virtually all foreign shipowners would find themselves subject to American tort law. *Id. quoting from Cruz v. Maritime Co. of Philippines*, 549 F.Supp. 285, 289 (S.D.N.Y. 1982), *affirmed*, 702 F.2d 47 (2nd Cir. 1983).

Volyrakis because the state courts imposed discovery sanctions for failure to provide information which is irrelevant under *Volyrakis*, and the other cases discussing the issue.

Respondent's argument that this case is similar to *Fisher* is inappropriately raised. The state trial court improperly refused to make any determination on the choice of law/forum non conveniens issue; it is impossible for this Court, or any other appellate court, to review the correctness of a decision that was never made! The failure of the state trial court to make the required choice of law/forum non conveniens determination justifies the issuance of a writ of certiorari.

III.

Respondent's Argument C suggests that the trial court's sanctions were appropriate because Petitioners refused to provide the "beneficial ownership" information. Respondent's Opposition, 25-27. This argument has been addressed above and in Petitioners' Original Submission. The inconsistencies between the State lower court decisions and established maritime law warrant issuance of a writ.

IV.

Respondent's Argument D suggests that the state courts properly refused to consider the forum selection clause of the decedent's maritime labor contract because this issue formed part of the defenses struck by the trial court. Respondent's Opposition, 27.

The place and terms of a seaman's contract are relevant to the issues of choice of law and forum non conveniens. Respondent conveniently fails to recognize that the

contractual choice of law and forum selection provisions also have relevance *separate and apart* from the forum non conveniens issue.

This Court, in *M/S BREMEN v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), held that the parties to a maritime contract would be bound by their advance agreement to submit their disputes to a designated court. The jurisprudence warns against the application of United States law when a foreign forum is contractually selected, or where foreign law should apply. See Petitioners' Original Submission, 20-22.

The issuance of a writ should be issued so that this matter of international importance can be considered.

CONCLUSION

Petitioners adopt and reurge the issues and contentions set forth in their original submission to the Court. The matters set forth therein, as well as the rebuttal set forth above, mandate the issuance of a writ of certiorari.

Respectfully submitted

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